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## THE RECOVERY OF MONEY PAID UNDER PROTEST.

It is hard to discover the precise limits of a legal doctrine which is undergoing a continual expansion. As litigation increases and the stream of decisions flows onward, it is difficult at any one point to map out the exact extent of territory covered. As old surveys lose their value except as furnishing the lines and directions upon which new ones may be made, the progress of the student becomes necessarily slow and cautious, and the fact that the principle whose extended application is to be investigated is a well worn and familiar one, serves only to increase the magnitude and consequently the difficulties of the task.

The principle which allows a recovery of money illegally demanded and paid under circumstances of duress is too elementary in its nature, and too deeply implanted in our practice to become the subject of doubt or contention, but its application, however, is varied and confusing. It is the object of the present essay to investigate one particular class of cases to which this principle of practice has been extended.

A payment under protest takes place where money is illegally demanded and paid, the payer adding to his act of payment a more or less formal declaration to the effect that the money so paid is wrongfully exacted. The English case of *Shaw v. Woodcock et al.*, 7 B & C. 73, may be taken as a good example of a payment under protest. It there appeared that the defendants had had in their possession

certain policies of insurance belonging to the plaintiff, and that the plaintiff, through his attorney, had asked the defendants to deliver up these policies, but that the latter insisted upon retaining them in possession upon an unfounded claim of lien. There had been several business transactions between the parties, and the defendants claimed that the plaintiff owed them a certain sum of money. It was to compel a satisfaction of this debt that the defendants claimed a lien upon the policies. The attorney of the plaintiff in order to obtain the latter paid the amount of the demand, handing the defendants at the time a statement in writing signed by his client, to the effect that he paid the money in order to obtain possession of the policies, and on no other account, and "that by such payment he did not mean to admit that they (the defendants) were entitled to a lien for the amount, or to any amount, on the said policies; and he (the plaintiff) would bring an action to recover back the sum so paid." In this case a recovery was obtained in an action for money had and received.

The phrase "payment under protest" must not prove misleading. Those payments which should properly be grouped by themselves, because of the fact that a protest accompanies them are much fewer in number than we might suppose. The great mass of cases usually cited in explanation of the heading, *payment under protest*, are not illustrative of this species of payments, but are in fact examples of a much larger class. This larger class consists of all payments made under circumstances of duress, and includes those made under protest. *McMillan v. Richards*, 9 Cal. 365; *Preston v. Boston*, 12 Pick. 13; *Detroit v. Martin*, 22 Am. Rep. 512; *Forrest v. Mayor*, 12 Abb. Prac. Rep. (N. Y.) 350; *Railroad Company v. Commissioners*, 98 U. S. 542.

It will be seen upon a moment's reflection that the circumstance of duress, not the circumstance of the protest, is the real ground upon which the plaintiff must subsequently base his action to recover. The duress being the cause, and the protest only an accompanying condition of the recovery, it is evident that we must study the larger class if we would comprehend the smaller. We must carry with us into our investi-

gation of the protest the principles of wider application which guide the courts in deciding upon the question of compulsion ; we must analyze the characteristics of the genus, if our investigation of the species is to be attended with practical results. In doing so, however, it will not be necessary to investigate all compulsory payments. The old duress *per minas* or by imprisonment so controls the body or enslaves the mind of the oppressed person as often to preclude even the possibility of a protest being made by him, while its character is so pronounced that any notice given to the oppressor of the wrong he is committing, would be only futile and superfluous. But where the character of the duress is more equivocal and the limits of the coercion not so easily recognized, where in other words the compulsion has begun to fade into persuasion—there on the border line, as it were, between involuntary and voluntary payments, shall we find the protest. For these reasons our investigation of compulsory payments as apart from payments under protest may be narrowed down to an analysis only of those payments where the illegal compulsion exercised upon the payer is one of the more questionable kind. We shall then pass over in silence payments made under the old *durities* of life or limb, or by imprisonment, and confine ourselves wholly to those induced by the more refined, and, so to speak, tenuous forms of duress, which are peculiar to our modern practice.

I. PAYMENTS UNDER THE MODERN FORMS OF DURESS. SOME OF THE LIMITS OF THE MODERN DOCTRINE. DURESS OF PROPERTY. THE WITHHOLDING OF A LEGAL DUTY.

How far have the Courts advanced beyond the limits of the old duress ? Lord Kenyon said in 1798, *Fulham v. Down*, 6 Esp. Rep. 26, that “where a voluntary payment was made of an illegal demand the party knowing the demand to be illegal, *without an immediate and urgent necessity* (or unless to redeem or preserve your person or goods), it is not the subject of an action for money had and received.” This dictum has been quoted in many of the cases: *Valpy v. Manly*, I. M. G. and S. 5 ; *Wabaunsee County v. Walker*, 8 Kan. 431 ; *Lamborn v. County Commissioners*, 97 U. S. 181 ; *Railroad Co. v. Com-*

*missioners*, 98 U. S., 541; *Union Insurance Co. v. Allegheny*, 101 Pa. St. 257 (Chief Justice Mercer).

The phrase under *an immediate and urgent necessity* may be taken as still expressing the limits of the law on this subject. See Chief Justice Waite's opinion in *Railroad Co. v. Commissioners*, 8 Otto, 541; see also *De La Questa v. Insurance Co.*, 136 Pa., 62. In a case, for instance, which came before the Supreme Court of Massachusetts, *Cook v. Boston*, 9 Allen, 393, it appeared that some wagon owners had for three years paid under protest to the City of Boston larger license fees than were legally demandable. Judge Dewey declared that they had shown no ground on which to found an action for money had and received. They had not offered a sufficient excuse to the Court for paying the excessive license fees. If those fees were excessive, and it was admitted that they were so, they had at the time of their exaction a valid defence against any action that the city might have brought against them. It was clearly their duty then to refuse to pay the sum illegally demanded, and await the institution of legal proceedings by the city. Payments, the court continued, to a tax collector armed with legal process to enforce his claims, were in no sense analogous to the case presented by the plaintiffs, for in those cases the party has no opportunity to appear in court and plead or argue in his defence, as the warrant of distress is already out against him. The temporary inconvenience to which the licensee might have been subjected by the institution of legal proceedings against him was not to be considered as amounting to a circumstance of duress. In short, in this case the necessity under which the plaintiff paid was neither urgent nor immediate.

Indeed, a licensee must in most cases dispute at the threshold the exaction of an excessive fee. The mere fact that his business will be subjected to an interruption through the necessity of defending himself against the exaction of the fee will not of itself constitute a circumstance of duress. There have been many decisions to this effect in this country: *Cook v. Boston*, 9 Allen, 393; *Mays v. Cincinnati*, 1 Ohio St., 274; *Allentown v. Suegar*, 20 Pa. St., 421; *Baker v. City*, 11 Ohio, St.

534 (*contra*). The only apparent exception to this rule that we have seen is the case of *Leonard v. City of Canton*, 35 Miss., 189, decided by the Supreme Court of Mississippi. The facts, however, that influenced the Judge who decided this case were themselves exceptional. The plaintiff, it seems, had obtained a license from the County Board of Police, authorizing him to retail vinous and spirituous liquors in the town of Canton for the period of twelve months from the first of January, 1857. The corporate authorities of the town during the months of February and March following passed sundry ordinances on the subject of retailing under<sup>2</sup> which the plaintiff was obliged to take out another license for the remainder of the year. Although the payment of this latter license fee was not accompanied by a protest he was allowed to recover the amount exacted from him. The Supreme Court of Mississippi, having decided that the corporate authorities of the town had no right under their charter to demand a fresh license fee, did not hesitate in concluding that the plaintiff had a valid ground of action. It will be seen, however, that the defendant in this case had committed more than a merely technical illegality; the town authorities had actually disturbed the plaintiff in the enjoyment of a license which they had already granted him. This decision should not therefore be used as an authority for the position that a licensee can under ordinary circumstances recover the amount of an illegal fee exacted from him.

On the other hand, where the destruction of one's business is threatened the payment will be regarded as compulsory. In a Pennsylvania case, *Lehigh Coal and Navigation Company v. Brown & Lawall*, to use, etc., 13 W. N. C., 81, decided in 1883, it appeared that the defendant, a navigation company upon the Lehigh river had threatened to draw the water from one of its dams, if the plaintiff, who was a log owner, refused to pay the amount of certain tolls. If the defendant had carried out its threat the plaintiff could not have got his logs to his mill and his business would have been "practically ruined". The tolls thus paid, having been proved illegal, were regarded by the Supreme Court as recoverable, the payment having been manifestly an involuntary one.

In thus suggesting at the outset some of the limits which the Courts have placed upon that compulsion which they deem sufficient to render a payment involuntary, Mr. Justice Field's words in *Brumagin v. Tillinghast*, 18 Cal., 265, may very properly be quoted. They are as follows: "It may in general be said that there must be some actual or threatened exercise of power possessed or supposed to be possessed by the party exacting or receiving the payment over the person or property of the person making the payment, from which the latter has no other means of immediate relief."

The current of judicial legislation in this matter of involuntary payments has long been flowing in one channel. A threatened wrongful seizure or detention of one's goods has since the beginning of the eighteenth century been regarded as sufficient to give the payer his subsequent right of action. The existence of a duress of property in connection with involuntary payments is now no longer to be questioned. It has become an established principle of law. The Courts, however, have gone one step further. As the detention of one's goods will often render a payment involuntary, so will sometimes the withholding of one's rights. The latter was at first recognized in cases where the parties were on an unequal footing, as, for instance, where an officer demanded an excessive fee or a creditor annexed an illegal condition to a composition deed and so extorted money from his debtor, *Smith v. Cuffe*, 6 M. & Selw., 160: see *Smith on Contracts*, pp. 300-302, and cases cited; *Chitty on Contracts*, 912, and cases cited. The same principle has been since applied in England to the case of a common carrier exacting an excessive rate for the performance of a legal duty: *Parker v. Great Western Railway Company*, 7 M. and Gr., 252; *Great Western Railway v. Sutton*, L. R. 4 H. L. C., 249; and in this country it has been recognized in a few analogous instances; *Hearsey v. Pryn*, 7 Johns., 179; *Hearsey v. Boyd*, 7 Johns., 182; *Ripley v. Gelston*, 9 Johns., 201.

A hasty glance at the text books and the cases is enough to show one that the instances of money paid under a duress

of property strictly speaking far outnumber the instances of money paid in order to induce the performance of a legal duty. Still, in order to help us in this discussion, it will be well for us to make such a classification of the cases. Money, then, is, under certain conditions, recoverable by an action for money had and received which the plaintiff was obliged to pay in order.

(I) To avert a wrongful seizure or detention of his property, and

(II) To induce the defendant to perform a duty which was legally due the plaintiff without such payment.

We shall consider in turn these classes of payments.

(I) The phrase *duress of property*, crude as it is, has the sanction of the best authorities; *Baron Parke*, 6 Exch. 345; *Id.* 704; *Block's Case*, 8 Ct. of Claims, 461.

The property is almost always personalty. Some of our judges have doubted, while others have even denied, the existence of a duress of real property. It is, however, reasonable and more in harmony with the cases, to admit the existence of a duress of real property, though for reasons to which we shall hereafter advert, it is of very rare occurrence. See Mr. Justice Bradley's decision in *Sanborn v. Commissioners*, 98 U. S. 181.

Perhaps the first recognition of a duress of goods is to be found in 20 Liber Assisarum, 14 (Part 5 of the Year Books). The question as to its validity arose upon an assize of novel disseisin. The demandant, an abbot, it appeared, had released all his right in a certain manor to the tenant. The release, however, had been extorted "*per duress fait al' Abbe per prisel de ses bestes*." The release was adjudged void. The report says that there had been no duress of imprisonment, and, although only a bare<sup>d</sup> outline of the facts is presented, it is safe to say that the Court of King's Bench in deciding for the abbot did so upon the ground of the duress of property to which he had been subjected. This case is cited in both Rolle's and D'Anvers' Abridgements under the head of duress. See this case referred to in *Oates v. Hudson*, 6 Exch. 348.

The particular principle decided in this case is no longer

part of the law of England. A man may not now avoid a contract by pleading duress of goods. In *Summer v. Ferryman*, 11 Mod. 201; a decision which has been sometimes cited as overruling the old case to which we have referred, the property which was made the subject of the alleged duress did not actually belong to the plaintiff. The words of Powell, J., in that case, to the effect that a man can avoid a deed only by proving personal duress, must therefore be regarded more or less as an *obiter dictum*. But Lord Denman's decision in the case of *Skeate v. Beale*, 11 Ad. & El. 990, coupled with Baron Parke's opinion as expressed in *Parker v. The Bristol and Exeter Railway Company*, 6 Exch. 702; *Oates v. Hudson*, Id. 348; *Atlee v. Blackhouse*, 3 M. and W. 633; *Pratt v. Vizard*, 5 B. Ad. 808; and *Kearns v. Durell*, 6 C. B. 596 (60 E. C. L. R.), leave no room for doubt as to the law on the subject in England to-day. In *Parker v. Railway Co.* Baron Parke says: "The mere duress of goods does not avoid a contract." The weight of American authority is apparently to the same effect, but the question seems to have come before our courts only in a few instances. *Hazelrigg v. Donaldson*, 2 Metc. (Ky.) 445; *Maissonaire v. Keating*, 2 Gall. 337; *Sasportas v. Jennings*, 2 Bay 211 (contra); see also *Parsons on Contracts*, I., 393.

It is possible to conceive of two species of duress of goods. First, it may be that the goods are still in the possession of their rightful owner, and that the payee threatens wrongfully to seize them. Or, secondly, it may happen that the goods are already in the possession of the payee, and that he threatens wrongfully to detain them.

(1.) *Payments made to avert a wrongful seizure.*

The seizure is usually that which takes place under color of law. It is usually that of a sheriff or government collector, and seldom that of a private individual.

It is now well settled in this country that a payment of taxes to a collector who has a warrant in his hands, authorizing him immediately to levy on the payer's goods for the amount of the taxes, is not a voluntary payment. *Joyner v. Third School District, etc.*, 3 Cush. 567; *Amesbury Co. v. Inhabitants*, 17



Mass. 461; *Boston Glass Company v. Boston*, 4 Metc. 181; *Preston v. City*, 12 Pick. 17; *Atwater v. Woodbridge*, 6 Conn. 223; *Wilson v. Mayor, etc.*, 1 Ab. Prac. Rep. 26; *Bradford v. Chicago*, 25 Ill. 411; *Note to Detroit v. Martin*, 22 Am. Rep. 512; *Dew v. Parsons*, 2 B. & Ald. 562.

In the *Boston and Sandwich Glass Company v. The City of Boston*, 4 Metc. 181, a leading case to which it will be well to refer at length, the company was allowed to recover the amount of certain taxes which had been illegally assessed against it between the years 1826 and 1839 inclusive. It appeared that up to the year 1839 the plaintiff had paid without protest the amount of these taxes to the defendant's collector after receiving the usual tax bills, to which was added the following statement:—

"By a vote of the town, passed 27th of May, 1811, the taxes must be paid within sixty days from the time they are issued. At the expiration of the sixty days, the treasurer by law is directed to issue a summons to those who are then delinquent, and, if the tax is not paid in ten days after such summons, with twenty cents for such summons, to issue his warrants to the special collectors, who will receive from the delinquents, in addition to the tax, the fees allowed by law on serving executions, viz., four per cent. on first \$100, and one and a half per cent. on all over \$200. Interest will also be charged."

"Richard D. Harris, Treasurer and Collector, Boston, September 1st."

The taxes illegally exacted in the year 1839 were paid by the plaintiff on the day after they became payable, but before the usual summons required by the law in the case of non-payment was issuable. The plaintiff made no verbal objection at the time the taxes were paid, although by its agent it immediately afterwards sent a written protest to Mr. Harris, the Treasurer and Collector. Judge Dewey, when the case came before the Supreme Court of Massachusetts, allowed the company to recover the amount of all these taxes. They had all been paid, those assessed prior to 1839 as well as those assessed during that year, in order to avert an otherwise inevitable seizure and sale of personal property. The fact that a protest had accompanied only the payment made in the year 1839,

did not limit the plaintiff to a recovery of the taxes paid at that time.

So in *Hospital v. Philadelphia County*, 12 Harris, 229; it appeared that certain property belonging to the plaintiff and legally exempt from taxation had been nevertheless assessed by the defendant's officer. Under a warrant of distress certain goods of the plaintiff had been consequently levied on. To prevent their being sold, the plaintiff paid under protest the amount of the assessment. The Supreme Court of Pennsylvania allowed the plaintiff to recover the amount so paid.

The doctrine as to the recovery of taxes illegally assessed and paid in order to avert a sale of personality has received an important limitation from the hands of the Supreme Court of the United States. It would appear from the case of the *Railroad Company v. Commissioners, etc.*, 98 U. S. 541, that an actual demand must have been made by the collector, and that the seizure and sale to prevent which the payment was made must have been imminent. The case is one which is so often cited that it will be advisable to dwell upon it at some length. It was a suit to recover back taxes for the year 1870 and 1871, paid by the Union Pacific Railroad Company upon certain lands in Nebraska. The suit was brought three years after the last payment was made, and after the decision of the court in *Railway Company v. McShane*, 22 Wall. 444, had been pronounced, which was supposed to hold that the lands in question were not subject to taxation. The other facts are stated as follows in the opinion of the court:—

“The lands were returned by the United States land officers to the State auditor and by him to the county clerk for taxation, as required by the General Statutes of Nebraska, and were placed upon the assessment list of the county. The general and the local taxes levied for the respective years were carried against these lands, with others upon the lists, and the railroad company designated as owner. In due time the tax lists, with warrants attached for their collection, were delivered to the treasurer of the county. The taxes for the year 1870 became payable May 1, 1871, and those for 1871, May 1, 1872. The warrants authorized the treasurer, if default should be made in the pay-

ment of any of the taxes charged upon the lists, to seize and sell the personal property of the persons making the default to enforce the collection."

"No demand of taxes was necessary, but it was the duty of every person subject to taxation to attend at the treasurer's office and make payment. During the years 1870, 1871, 1872, the railroad company was the owner of other lands in the county, and other property, both real and personal, on which taxes were properly levied. On the 11th of August, 1871, the company attended at the treasurer's office, and paid all taxes charged against it for the year 1870, and on the 20th of July, 1872, all that were charged for the year 1871. Before these payments were made, there had been no demand for the taxes, and no special effort had been put forth by the treasurer for their collection. The company had personal property in the county which might have been seized; but no attempt had been made to seize it, and no other notice than such as the law implies had been given that payment would be enforced in that way."

"At the time the several payments were made, the company filed with the treasurer a notice in writing that it protested against the taxes paid, for the reason that they were illegally and wrongfully assessed and levied, and were wholly unauthorized by law, and that suit would be instituted to recover back the money paid."

The late Chief Justice Waite, who delivered the opinion from which we have quoted, which was adverse to the claim of the railroad company, says, after reviewing the decisions:

"The real question in this case is whether there is such an immediate and urgent necessity for the payment of the taxes in controversy as to imply that it was made under compulsion. The treasurer had a warrant in his hands which would have authorized him to seize the goods of the company to enforce the collection. This warrant was in the nature of an execution running against the property of the parties charged with taxes upon the lists it accompanied and no opportunity had been afforded the parties of obtaining a judicial decision of the question of their liability. As to this class of cases, Chief

Justice Shaw states the rule in *Preston v. Boston*, 12 Pick. (Mass.), as follows: 'When, therefore, a party not liable to taxation is called upon peremptorily to pay such a warrant, and he can save himself and his property in no other way than by paying the illegal demand, he may give notice that he so pays it by duress and not voluntarily, and by showing that he is not liable, recover it back as money had and received.' This, we think, is the true rule, but it falls far short of what is required in this case. No attempt had been made by the treasurer to serve his warrant. He had not even personally demanded the taxes from the company, and certainly nothing had been done from which his intent could be inferred to use the legal process he held to enforce the collection, if the alleged illegality of the claim was made known to him. All that appears is, that the company was charged upon the tax lists with taxes upon its real and personal property in the county. After all the taxes had become delinquent under the law, but before any active steps whatever had been taken to enforce their collection, the company presented itself at the treasurer's office, and in the usual course of business paid in full everything that was charged against it, accompanying the payment, however, with a general protest against the illegality of the charges and a notice that suit would be commenced to recover back the full amount that was paid." \* \* \* \* \*

"Under the circumstances, we cannot hold that the payment was compulsory in such a sense as to give a right to the present action." See in this connection *Smith v. Inhabitants of Redfield*, 27 Me. 147; *Atwell v. Zeluff*, 26 Mich. 118; *McKee v. Campbell*, 27 Mich. 500.

The payee may be a private individual seeking to enforce a claim. In *Valpy v. Manly*, 1 M. G. & S. 594, a conflict arose between the assignees in bankruptcy of a certain firm and the under sheriff who had been charged with the execution of a *fi. fa.* against the property of the firm. An entry had been made upon the premises under the sheriff's warrant, indeed an inventory had been made, and in the course of making the inventory a cart-shed had been broken open and a wagon taken out. The assignees finally sent a clerk to the under

sheriff's office to inquire whether or not the sheriff intended to sell; and upon the under sheriff saying that the latter did intend to sell, the assignees' clerk paid under protest the amount claimed upon the writ. It was clear from the facts of the case that the assignees, who were the plaintiffs, were already in possession of the premises, and that consequently the threatened seizure by the sheriff would have been unauthorized. Tindal, C. J., and Judges Coltman, Cresswell, and Erle, were all of the opinion that the plaintiff had made out a valid right of action.

For reasons to which we shall hereafter refer, a dispute as to the payment of rent cannot be settled by the payment of a particular rental followed by an action for money had and received for its recovery. A threatened distress for rent will not be regarded as a valid ground for the subsequent recovery, replevin at the time being manifestly the proper and convenient form of action to which the plaintiff should have resorted: *Lindon v. Hooper*, Cowp. 414; *Knibbs v. Hall*, Esp. 84; *Colwell v. Peden*, 3 Watts, 327. So also wherever a special action is given by statute, there, if such action will satisfy the peculiar exigencies of the plaintiff's case, the law would rather have him adopt the course which it has marked out for him. *Phillips v. Jefferson Co.*, 5 Kans. 412.

2. *Payments made to prevent a wrongful detention of personality.*

Bayley, J., in *Shaw v. Woodcock*, 7 B. & C. 73, lays it down as a general rule, that "if a party has in his possession goods or other property belonging to another, and refuses to deliver such property to that other unless the latter pays him a sum of money which he has no right to receive, and the latter, in order to obtain possession of his property pays that sum, the money so paid is a payment made by compulsion, and may be recovered back." In *Ashmole v. Wainwright*, 2 Q. B. 937, Patterson, J., declared: "I never doubted that an action for money had and received, might be maintained to recover money paid on the wrongful detainer of the goods; it would be very dangerous to do so, the doctrine being in itself so reasonable, and supported by so many authorities."

And in the same case Coleridge, J., used words that were almost identical with those which we have quoted. See also opinion of Reed, J., in *White v. Heylman*, 10 Casey, 142.

The act by which the payee has obtained possession of the property may have been in itself either legal or illegal. It may have been under the sanction of legal authority, as where a customs collector seized goods passing through his hands for the payment of a duty, or it may have been made by a private individual without even the color of legal authority.

The case of *Irving v. Wilson*, 4 Term, 485, was an action for money had and received to recover the amount of certain duties wrongfully demanded and paid under alleged circumstances of duress. The evidence showed that while the plaintiff was on his way from Scotland into England with some hams, the latter had been wrongfully seized and detained by officers of the customs. A permit which allowed him to bring the hams across the border free of duty was in one of the plaintiff's wagons which had not yet come up when the seizure was made. But the officers even after they had seen the permit, refused to deliver up the hams unless certain duties were paid upon them. The plaintiff objected to the exaction. He, however, paid the amount demanded in order to recover possession of his hams. Lord Kenyon was clearly of the opinion that since the money so paid was not legally demandable the plaintiff was entitled to recover it. This case has been followed by numerous decisions to the same effect, both in England and in this country. See *Chitty on Contracts*, 940, and cases cited; *Campbell v. Hall*, Cowp. 204; *Elliott v. Swartwout*, 10 Pet. 137; *Greeley v. Thompson*, 10 How. 226; *Maxwell v. Griswold*, 10 How. 242, 246.

In *Clinton v. Strong*, 9 Johns. 370, a case often cited, an American ship had been seized by a United States collector for having violated certain provisions of the Non-Intercourse Acts, and a libel had been filed against her in the District Court. The Act of March 2d, 1811, having repealed the special act under which the seizure had been made, the ship and her cargo were liberated by the custom house authorities, but the marshal of the Court refused to

allow the plaintiffs (the owners of the vessel) to land their cargo until the amount of certain bills and fees was paid by them. The plaintiffs objected to these charges, but in order to land their cargo they paid the amount demanded. The Supreme Court of the State held that this payment of costs could not be considered as a voluntary act. "They were exacted by the officer *colore officii*, as a condition of the re-delivery of the property. It would lead to the grossest abuse, to hold a payment made under such circumstances to be a voluntary payment, precluding the party from contesting it afterwards."

It frequently happens that a commission broker wrongfully detains property in his hands in order to satisfy a groundless claim of lien: *Briggs v. Boyd*, 56 N.Y. 289. Sometimes a common carrier extorts an excessive charge from a consignee by refusing to deliver up goods which have been consigned to him: *Clitty on Contracts*, 941 and cases cited; *Baxendale v. Great Western Co.*, 32 L. J. C. P. 225; S. C. affirmed, Cockburn, C. J., 33 Id. 197. In these cases money paid in order to obtain a delivery of the goods so detained, may generally be recovered back.

In the well-known case of *Astley v. Reynolds*, 2 Strange, 915, the plaintiff had pawned a piece of plate to the defendant for twenty pounds. When the time for the payment of the debt arrived, the plaintiff tendered the defendant the principal and four pounds interest, but the latter would not deliver up the plate unless the plaintiff paid him ten pounds interest. After some months, the plaintiff made him another tender of the principal and four pounds interest, but, as the defendant still insisted upon the ten pounds interest, the plaintiff then paid the full amount demanded of him. The court allowed the plaintiff to recover the difference between the amount of interest extorted from him and the amount which was legally due upon the debt. The court said: "We think also that this is a payment by compulsion; the plaintiff might have had such an immediate want of his goods, that an action of trover would not do his business. Where the rule *volenti non fit injuria* is applied, it must be where the party had the freedom of exercising his will, which this man had not; we

must take it that he paid the money, relying on his legal remedy to get it back again:" 2 Strange, 915, 916. The court, it seems, did not intend to say that in all cases the wrongful detention of a chattel would be sufficient to make a payment compulsory, but only that where the payer had reason to believe that an action for the recovery of the specific chattel would not accomplish his purpose, there his payment would be regarded as compulsory.

Judge Spencer, in *Hall v. Schultz, et. al.*, 4 Johnson's Reports, 240, said that this case in Strange had been subsequently overruled by *Knibbs v. Hall*, 1 Esp. 84. With all due deference to the learned New York jurist, it would seem that the latter case is not really in conflict with the principle of *Astley v. Reynolds*. In *Knibbs v. Hall*, the plaintiff had rented some chambers of the defendant, and had paid a larger rental for them than was legally due, in order to avoid a threatened distress. Lord Kenyon, as we might have supposed, would not allow the plaintiff to recover on the ground that replevin and was the proper mode of settling such a dispute between a tenant and his landlord. The relation of pawnbroker and customer on the other hand suggested no particular form of action as peculiarly appropriate where the pawnbroker refuses to deliver up the thing pawned. The facts in *Hall v. Schultz et al.*, were not at all analogous to those in *Astley v. Reynolds*. Indeed, Judge Spencer says himself, "without undertaking to pronounce between the cases cited" (*Astley v. Reynolds* and *Knibbs v. Hall*), "the present differs from both." It appears that the defendants, had agreed to buy a piece of ground of the plaintiff which was to be sold upon an execution, and afterwards to re-convey the land in question to the plaintiff, upon the plaintiff paying them the sum advanced together with a reasonable compensation for their services. Afterwards, when the plaintiff tendered them the amount of the sum they had advanced, together with what the court subsequently regarded as a reasonable compensation, the defendants refused to re-convey except upon the payment of an additional \$300. The plaintiff objected to this demand, but finally paid it. The court, Judge Thompson alone dissenting, concurred in the



opinion that the plaintiff's action for a recovery of the sum so paid was not maintainable. Judge Spencer pointed out that the original agreement, not being in writing, could have been avoided by the defendants, had the plaintiff brought an action upon it. It was necessary, then, to regard the plaintiff as having paid the money just as any other purchaser of the property might have done. The defendants had a right to make their own terms, and, if the plaintiff "voluntarily and with his eyes open, fixed the compensation claimed by the defendants, and paid them the money, he could have no claim to call on the court to aid him in getting rid of what he conceived an unconscientious advantage." This decision, then, does not necessarily militate against the principle upon which the English case in *2d Strange* was decided. Indeed *Astley v. Reynolds* is still cited by the best authorities as representing the law both in England and this country: *Chitty on Contracts*, 940; *Greenleaf on Evidence*, II., § 121; *Parsons on Contracts*, I., 392; *Atlee v. Blackhouse*, (*Parke, B.*), 3 M. & W. 633-650; *Wakefield v. Newborn* (*Ld. Denman*), 6 Q. B. 276.

After citing *Astley v. Reynolds*, and noting the fact that in that case the plaintiff might have had trover for his goods, Chitty in his book on Contracts, continues: "So if a party pay an arbitrator in order to take up an award a sum larger than is reasonably due to such arbitrator in respect of fees, etc., he may, it appears, sue for the excess in this action." In the same connection he instances the cases of *Wakefield v. Newborn*, 6 Q. B. 276, and *Close v. Phipps*, 7 M. & G. 586, in both of which money that had been paid under protest to obtain the possession of title deeds was subsequently recovered. In the latter case, where "the attorney of a mortgagee who had a power of sale refused to stop the sale or deliver up the title deeds of the mortgaged property except on the payment by the mortgagor of certain expenses not properly chargeable, it was held that the administratrix of the mortgager, who "had paid the excess under protest, could recover it in this action, although the right of the plaintiff to stop the sale was an equitable right only." It has thus been decided in Pennsylvania that where a person gets possession of a deed and by threats

to destroy it extorts money from another who is interested therein, the payment is involuntary and may be recovered back: *Motz v. Mitchell*, 91 Pa. St., 114; see also *Cartwright v. Rowley*, 2 Esp. 723; *Oates v. Hudson*, 6 Exch. 345.

3. *Payments under duress of real property.*

It has been only during the last fifty years that cases of payments alleged to have been made under compulsion in order to avert a threatened divestiture of title to real property have found a place in our reports. The questions arising in this connection are perplexing, and we shall be able to do little more than set forth in some detail what are perhaps the leading cases. The decisions on the subject, as far as we know, are almost all American. Johnson, J., in the Ohio case of *Stephen v. Daniels*, 27 Ohio St., 544, indeed, cites *Wakefield v. Newborn*, 6 Q. B. 276, an English decision, as an instance of duress of real property. There, as has been seen, money paid under protest by a mortgager to obtain title deeds, withheld on an unfounded claim of lien, was afterwards recovered back. This case and others of a similar nature where money was paid in order to obtain certain muniments of title wrongfully withheld, seem more properly to fall under the class of payments made in order to prevent a wrongful detention of personal property. See *Smith v. Sleab*, 12 M. & W., 585; *Close v. Phipps*, 7 Man. & Gr. 586. The same Judge, in deciding the Ohio case already cited, says: "Perhaps the true reason why the rule at common law did not extend to lands as well as goods was the fact that at common law lands could not be sold on execution to satisfy any money demand. The *capias ad satisfaciendum* was a command to take the body, the *feri facias* to take the goods and chattels, and the *levari facias* reached goods and the *profits of the land*. The land itself could not be sold." Indeed there is now only one class of cases in which a duress of realty can arise. It may arise upon a summary proceeding against land for the satisfaction of a money claim. One of our Judges suggests that a duress of real property may exist where a mortgagee has a power of sale without the institution of legal proceedings, or where, "a mortgager is in possession after

condition broken." *Deady, J., in Mariposa v. Bowman*, Deady, 228. But the only familiar instance is that of the payment of an illegal tax made in order to avert a sale of realty or to prevent the delivery of a deed after such a sale to the holder of the sheriff's certificate.

A summary proceeding against real estate for the satisfaction of a money claim has seldom been allowed by statute, and for reasons upon which we shall hereafter enlarge, the compulsion of legal process which might by an appearance in court have been averted, can never constitute duress: *Taylor v. Board of Health*, 7 Casey 73.

Real property is not perishable, and a merely nominal and temporary *divestiture* of title can work no irreparable injury to the rightful owner. Under most circumstances his proper course will be to refuse to pay, although the proceeding is summary in its nature and allows him no opportunity to appear and make defence to it. In *Forrest et al. v. the Mayor, etc.*, 13 Abb. Prac. Repts. (N. Y.) 350, the executors of one Daniel Fanshaw, deceased, sought to recover the amount of an assessment paid by their principal, as they alleged, under circumstances of illegal compulsion. It appeared that the testator had paid under protest the amount of this demand in order, as he alleged, to prevent his land from being sold, but it also appeared that the sale of his property might have been otherwise averted by contesting in court the legality of the assessment. Upon a subsequent application of the testator to one of the Judges of the Supreme Court the assessment had been set aside for fraud and illegality. When, however, the executors sought in this action to recover the amount so paid the same court denied their right of action, holding that the payment by the testator had been purely voluntary. He ought clearly to have resisted the demand. His land would not have "disappeared or perished," neither would his title have been impaired while he was taking the proper steps to contest the illegal or fraudulent assessment.

In the case we have just referred to a vendee at the sale, had such a sale been held, would not have taken even a colorable title to the property. Where, however, such a sale

would give a colorable title, there being no other way open to the owner to avert the sale save by a payment of the claim, the ends of justice require a different answer. *Detroit v. Martin*, 22 Am. Rep., 512; *Lamborn v. County Commissioners*, 97 U. S. pp. 187-188.

It would appear indeed that where the owner, of his own motion, satisfies an unfounded lien against his property he may not afterwards recover the amount of money so paid; but where a demand is made upon him by a person who has power and authority summarily to sell the realty in order to satisfy the claim, there, if the sale would have been such as would give to a vendee colorable title, the money so paid is afterwards recoverable.

In *Mariposa Co. v. Denman*, Deady, 228, a decree of foreclosure under a mortgage upon a certain piece of land in California had been duly satisfied. The Sheriff, however, wholly disregarding this fact, sold the property to the defendant. The latter received from the Sheriff a certificate of sale, and the plaintiff, in order to prevent a deed from issuing on this certificate, paid to the defendant the sum which he pretended to have given—there had been some collusion between him and the mortgagee—for the property at sale, together with interest thereon and the fee for the certificate. It was clear that this was a voluntary payment. The plaintiff had paid *of his own accord* the money in order to satisfy an unfounded claim against his property.

In *Fleetwood v. The City of New York*, 2 Sandf. Su. Ct. Repts., 475, the owner of certain lots which had been sold by the city authorities in order to satisfy certain illegal assessments had, in order to redeem the lots, paid under protest to the street commissioners the amount for which they had been sold. The owner subsequently brought this action against the city to recover back the money that he had so paid. The court regarded the payment as a voluntary one, holding that the muniments of title upon an assessment sale consisted of several proceedings, and that in this case, according to the plaintiff's own showing, at least three links in the chain of these proceedings were wanting. In other words,

each of these proceedings formed an essential part of the record of the assessment title, and in their absence the title would have been void upon its face. The Court adds: "The assertion of a title under such conveyance, or a lien by virtue of such judgment, does not afford a ground for equitable interference; much less does it constitute legal compulsion."

In *Detroit v. Martin*, 22 Am. Rep., 512, the plaintiff below had paid under protest the amount of an assessment for the opening of a certain street in the City of Detroit. The law under which the assessment had been levied and collected, was subsequently declared unconstitutional by the Supreme Court of Michigan. The latter tribunal, however, would not allow a recovery of the money so paid. The payer had had, indeed, no alternative, the proceedings against his land having been of a summary kind; but the sale would not have constituted a cloud upon his title, and the threat of it could not therefore be regarded as a circumstance of compulsion. Judge Marston, in delivering the opinion in this case, said that if the sale would have constituted a cloud upon the plaintiff's title his right to a recovery would have been sustained. The Judge quoted with approval the following passage from *Cooley on Taxation*, 542: "A cloud upon one's title is something which constitutes an apparent incumbrance upon it; something that shows *prima facie* some right of a third party either to the whole or some interest in it. An illegal tax may or may not constitute such a cloud. If the alleged tax has no semblance of legality, if upon the face of the proceedings it is wholly unwarranted by law, or for any reason totally void, so that any person inspecting the record and comparing it with the law is at once apprised of the illegality, the tax, it would seem, could neither constitute an incumbrance nor an apparent defect of title, and, therefore, in law could constitute no cloud." But see in this connection the opinion of Deady, J., in *Mariposa Co. v. Bowman*, Deady, 228.

*Stephan v. Daniels et al.*, 27 Ohio St. 528, was an action against a county treasurer to recover back an assessment afterwards admitted to have been illegal. Before December 20, 1868, the plaintiffs below, who, it seems, had other taxes

due on that day as well as this assessment, tendered to the treasurer the other taxes, which he declined to receive unless the amount due on the assessment was also paid. This was declined by the plaintiffs. The property was returned delinquent for both taxes and assessment, and the real estate was advertised to be sold on January 19, 1859, at a delinquent tax sale in order to satisfy these claims. On the 13th of January, 1869, the plaintiffs, in order to release the land from custody and prevent its being sold, paid the taxes and the illegal assessment under protest. The right to a recovery in this case rested, it is true, upon a particular statute. The Court, however, after an exhaustive review of the cases, came to the conclusion that the plaintiffs below had also at common law a right of action. After declaring that according to the more modern authorities the rule as to the compulsory payment of taxes should not be limited to cases where "persons or goods" alone are in jeopardy, the court said: "The cases cited abundantly support the broader statement of the rule as laid down in *Mays v. Cincinnati*, 1 Ohio St. 274, that where money is paid under protest to an officer on summary process without a day in court, to prevent a sale of property, *real or personal*, it may be recovered back." See also *Thompson v. Kelley*, 2 Ohio St. 651; *City of Marietta v. Slocumb*, 6 Ohio St. 471; *Bradford v. Chicago*, 25 Ill. 411; *Elston v. Chicago*, 40 Ill. 514; *Phillips v. Jefferson County*, 5 Kan. 412; *Waubause v. County*, 8 Kan. 431; *Lamborn v. Commissioners*, 97 U. S. 181. In a California case (*Hays v. Hogan*, 5 Cal. 241, it appeared that the collector of a town had demanded a larger tax than was legal, and had also proceeded summarily to recover the same when he should have proceeded by suit. The plaintiff bought in his land in order to protect his title from a cloud. The duress was admitted by the Judge who decided this case, although he also based his decision in favor of the plaintiff upon the ground that as purchaser at a void sale he had received nothing for his money. See comments on this case in *Deady*, 232; and 22 Am. Rep. 512.

In *Insurance Co. v. City of Allegheny*, 101 Pa. St. 250, the plaintiff had bought in a certain piece of property at a

mortgage sale, the deed delivered to the plaintiff for the property so sold having been executed by the Sheriff, July 21st, 1877. The facts were summed up as follows by the late Chief Justice Mercur, who delivered the opinion in the case: "Municipal taxes had been assessed on the property for the year 1875 and 1876, which could not be collected for want of goods and chattels on which to levy. In March, 1878, claims for these taxes were filed in the Prothonotary's office, under the act of 14th of June, 1863, which provided for the entry of judgment thereon, the issuing of execution forthwith, and the sale of the real estate. Execution had issued on one of the judgments thus obtained; the real estate then owned by the plaintiff was levied on and advertised to be sold. The plaintiff paid the judgment under protest. A year thereafter the City Solicitor demanded of the plaintiff payment of the other judgment for the taxes of 1876 with a threat that unless paid he would proceed to enforce payment by sale of its property. The plaintiff thereupon paid this judgment under protest. This action is to recover the sums thus paid for taxes, interest and costs covered by both judgments." It was conceded that the lien of the taxes had been divested by the Sheriff's sale under the mortgage. The late Chief Justice did not, however, think the company had a right to recover. He says: "No authority is found which holds that money paid to prevent the sale of lands under a threat to sell the same on a judgment which is not a lien thereon, can be recovered back by reason thereof." But besides basing his opinion on this ground, he says that the plaintiff should have availed itself of the equitable remedy open to it. This doctrine that the plaintiff should apply for an injunction restraining the collection of an illegal tax is, as we shall hereafter see, peculiar to the Supreme Court of Pennsylvania. In *Shaw v. City of Allegheny*, 115 Pa. St. 46, taxes were paid under almost identical circumstances, except that the plaintiff had made a futile application to the equitable powers of the Court. Upon this ground he was allowed a recovery. In this connection see *Espy v. Allison*, 9 Watts, 462; *Boas v. Updegrave*, 5 Barr, 516.

Referring to the fact that in the case of *Stephan v. Daniels*, a legal tax had been combined with an illegal assessment, and that perhaps a sale would have therefore conferred a valid title upon the purchaser, Mr. Justice Bradley in *Lamborn v. County Commissioners*, 97 U. S. 181, says: "Where such would be the effect of a tax sale, we cannot doubt that a payment of the tax made to prevent it, should be regarded as compulsory and not voluntary. The threatened divestiture of a man's title to land is certainly as stringent a duress as the threatened seizure of his goods; and if imminent and he has no other adequate remedy to prevent it, justice requires that he should be permitted to pay the tax, and test its legality by an action to recover back the money. But as in general an illegal tax cannot furnish the basis of a legal sale, the case supposed cannot often arise."

II. PAYMENTS MADE IN ORDER TO INDUCE THE DEFENDANT TO PERFORM A DUTY WHICH WAS LEGALLY DUE THE PLAINTIFF WITHOUT SUCH PAYMENT.

In the *Great Western Railway Co. v. Sutton*, L. R. 4 H. L. C. 249, a case which came before the House of Lords, Mr. Justice Blackburn said: "I have always understood that when a man pays more than he is bound to do by law for the performance of a duty which the law says is owed to him for nothing, or for less than he has paid, there is a compulsion or concussion in respect of which he is entitled to recover the excess by *condictio indebiti*, or action for money had and received." Here then is a compulsion arising from the threatened non-performance of a duty; the sin, as it were, being one of omission rather than of commission. The old duress usually arises through the commission of an illegal act or the threat of such commission; but this modern refinement of the old duress springs into being merely upon the threatened omission of a duty.

It is now well settled in England that a shipper who, in order to secure from a common carrier the performance of his legal duty, pays a charge greater than that allowed by statute, may, as a general rule, recover it back in an action for money had and received: *Parker v. Bristol and Exeter Ry.*



*Co.*, 6 Exch. 702; *Parker v. Great Western Ry. Co.*, 49 E. C. L. R. 253; *Baxendale v. Eastern Counties Ry. Co.*, 4 C. B. N. S., 63; *Baxendale v. Great Western Ry. Co.*, 32 L. J. Repts. 225; S. C. affirmed by Cockburn, C. J., 32 L. J. Repts. N. S. 197; *Peddington v. Ry. Co.*, C. B. Repts. N. S. vol. 5, 109. The action is usually brought to recover a number of illegal charges exacted through a more or less extended period of time, the right to a recovery arising from the fact that the common carrier refused in each case to perform a carriage unless the shipper paid him the overcharge.

As we have already pointed out the right to recovery of a charge illegally exacted by a common carrier, may also arise through the carrier's refusal to deliver up the goods of the shipper: *Ashmole v. Wainwright*, 2 Q. B. 937. When the shipper's goods are already in the carrier's hands, and the latter refuses to deliver them except upon the payment of an illegal charge, the duress is clearly that of property, the shipper's excuse for payment and subsequent ground of action being that his goods would otherwise have been subjected to a wrongful detention. If, on the other hand, the carrier demands the illegal charge before the goods have been delivered to him, and the shipper yields to the demand and pays the charge in order to secure the carriage of his goods, he has a right of action for the illegal excess so paid, on the ground that the enjoyment of a right allowed him by statute, would otherwise have been denied him.

In the earlier cases of money recovered because illegally demanded as the condition of the performance of a legal duty due the plaintiff without such payment, the oppression usually arose from the difference in the positions of the payer and the payee. They did not treat upon an equal footing. The payer was an embarrassed debtor and the payee his creditor: *Chitty on Contracts*, 912, and cases cited; or the payee was a private individual and the payer a government officer: *Morgan v. Palmer*, 2 Barn. & Cr., 729; *Stephenson v. Mortimer*, Cowp. 805.

Chitty, in his work on contracts, says: "Money obtained by oppression and by taking advantage of the distresses of others,

in violation of the laws made for their protection, may be recovered in an action for money had and received": *Chitty on Contracts*, 912, and cases cited. "So," he continues, "it has been held that this action will lie to recover money paid by the plaintiff, a bankrupt, as an inducement to the defendant to sign his certificate. And in like manner money privately paid to an outstanding creditor to induce him to concur with other creditors in a composition agreement made by an embarrassed debtor may in some cases be recovered in this action. Thus, if bills are given to the creditor, either for the amount of the composition or for the money paid to induce him to execute the composition deed, and such bills are negotiated by the creditor and payment thereof is enforced by the holders against the debtor, it seems that, inasmuch as the fact of the bills being negotiated deprives the debtor of the defence which he would have had to an action on the bills by the creditor, he may, after paying the same, recover the excess from the creditor as money paid by compulsion."

It was in *Smith v. Cuffe*, 6 M. & Selw. 160, a case that presented these conditions, that Lord Ellenborough made his celebrated remark about oppression: "This is not a case," he said, "of *par delictum*, but of oppression on one side and submission on the other. It can never be predicated as *par delictum* when one holds the rod and the other bows to it. There was an inequality of situation between these parties—one was a creditor, the other a debtor, who was driven to comply with the terms which the former chose to enforce." See *Smith on Contracts*, 303; *Lowrey v. Bourdieu*, 2 Doug. 472; *Townson v. Wilson et al.* (Lord Ellenborough), 1 Campb. 396.

The oppression, as we have said, may be that of a public officer over a private individual. "The payment of illegal fees exacted *colore officii* can seldom be considered voluntary so as to preclude their subsequent recovery": *Bouvier's Law Dictionary*, "Payment Under Protest"; *Morgan v. Palmer*, 2 B. & C. 729; *Chitty on Contracts*, 940; *Clinton v. Strong*, 9 Johns. 370; *Baker v. City*, 11 Ohio, 534; 2 Sm. L. C. 404; *Steele v. Williams* (Martin B.), 8 Exch. 624. The cases in point are

very numerous. Thus, in *Andrews v. Cawthorne*, Willes, 536, a recovery was had where the plaintiff had paid a larger burial fee than was allowed by Act of Parliament. "So," as Chitty points out, "fees charged by a parish clerk—contrary to 6th and 7th William III., c. 86, s. 35—for extracts taken from a register book of burials and baptisms, have been held recoverable from him in this action": *Chitty on Contracts*, p. 913.

In another case cited by the same author the steward of a Copyhold Court refused to admit the plaintiff except upon the payment of certain fines and fees not duly payable. The plaintiff paid the fines and fees under protest, and was subsequently able to recover them. In a case in *Loft's Reports* an illegal charge which had been paid for postage was recovered: *Loft*, 753.

In *Ripley v. Gelston*, 9 Johns. 201, it appeared that a Spanish vessel had put into New York in distress and had been subsequently sold. Her purchasers, in order to obtain a clearance, were obliged to pay into the collector's hands the amount of a certain tonnage duty and light money which the latter claimed as due to the United States. The purchasers were thus forced to pay these moneys or subject their commerce to an injurious interruption. Judge Van Ness declared that the payment so made was a compulsory one. In a Pennsylvania case a recovery was had of certain additional fees illegally exacted from a steamship company by a United States Shipping Commissioner: *American Steamship Co. v. Young*, 8 Norris, 201. Judge Sterrett, in delivering the opinion of the Court, said, that a public officer "*who virtute officii* demands and takes as fees for his services what is not authorized or more than is allowed by law should be compelled to make restitution."

The right of a shipper to an action for money had and received in order to recover from a common carrier the excess upon an illegal overcharge paid in order to obtain the performance of the carrier's legal duty is, as we have said, well recognized in England. Such authorities as *Chief Justice Tindal*, 49 E. C. L. Repts. 292, 293, *Barons Parke and Pollock*,

6 Exch. 702, and *Lord Chelmsford and Lord Cairns*, 4 Eng. & Ir. App. Cases 249, have lent their sanction to this application of the action of *assumpsit*. Perhaps the leading case is that of *Parker v. The Great Western Railway Company*, 7 Manning and Granger, 252. By the Acts of Parliament under which the defendant company had been incorporated it was provided, that the charges for the carriage of goods should be reasonable and equal for all persons; and that no reduction or advance should be made, either directly or indirectly, in favor of or against any particular person. The plaintiff, it appeared, was himself an extensive carrier, and like one of our local express companies, handled the goods which the defendant carried for him. In other words the defendant in its dealings with him was saved the extra expense of collecting, loading, unloading and delivering the goods which it carried. The allowance, however, which it had allowed other carriers for such services, it had refused him. It had also in other respects illegally discriminated against him. The plaintiff had in the case of each overcharge first tendered the proper amount and then paid the excess under protest. Having decided that the excessive charges so paid to the railway company were not legally demandable, Chief Justice Tindal sustained the plaintiff's right of action. "We are of the opinion," he said, "that the payments were not voluntary. They were made in order to induce the company to do that which they were bound to do without them; and for the refusal to do which, an action on the case might have been maintained, as was expressly decided in the case of *Pickford v. The Grand Junction Railway Company*, 10 M. & W. 399."

We have found no American decisions directly establishing the right to the common law action for money had and received against a railroad company where the latter has demanded and received an illegally excessive charge for the performance of its legal duty. It would appear, however, from the respect with which many of our courts have cited the English decisions on this subject, that the absence of actual precedent in this country is not due to any unwillingness on the part of our judiciary to recognize the

propriety of the common law remedy. The case of *Hearsey v. Pryn*, 7 Johns. 179, decided by Judge Spencer, was an instance of an action successfully maintained against a toll-gatherer for the recovery of certain bridge tolls which had been illegally exacted by the defendant. See also *Hearsey v. Boyd* (Judge Van Ness), 7 Johns. 183; *Lewis v. Hammond*, 2 Barn. & Ald. 206; *Waterhouse v. Keen*, 2 B. & C. 200.

### III. THE DAY IN COURT. AS PLAINTIFF; AS DEFENDANT.

Our examination of those compulsory payments with which a protest is likely to be coupled would be far from complete without referring to one condition which is always deemed essential to the subsequent recovery. The plaintiff must have been without his day in court. By this is meant that the payer, in order successfully to maintain his action for a recovery, must show that no opportunity was open to him in a court of law for adequate redress, or to secure the prevention of the wrong to which, but for his act of payment he would have been subjected. If he had such opportunity, then his payment was not made under circumstances of immediate or urgent necessity.

It is plain that such an opportunity may present itself in one of two ways. First, the payer may have an action at common law against his oppressor by which adequate redress may be obtained after the threatened wrong has been inflicted. Secondly, he may have an opportunity to appear in court and make defence and so prevent the infliction of the wrong. The latter conditions are present where the only compulsion threatened is that of the process of a court of competent jurisdiction.

1. *He may have an action at common law by which adequate redress may be obtained after the threatened injury is inflicted.*

A recovery in the case of *Astley v. Reynolds*, 2 Strange, 915, would not, as we have seen, been allowed, had the court been of opinion that an action of trover would have served the plaintiff's purpose. Upon the same ruling the decision of *Oates v. Hudson*, 6 Exch. 346, was based. In the case of *Sillman et al. v. The United States*, 11 Otto 465, certain barges

belonging to the plaintiff's firm had been rented by the Quartermaster General during our Civil War. The latter arbitrarily changed the terms under which it had been agreed to hold the barges, and refused after a certain date not only to pay the old rentals, but even to deliver up the barges to the plaintiff. The plaintiff finally yielded and agreed to make new charter parties, stating at the time that he did so not voluntarily, but under circumstances of compulsion. The rentals under the new charter-parties were regularly paid and received. The Court of Claims would not allow the plaintiffs to go behind these later charter-parties and recover the money due upon their original contract. Mr. Justice Harlan, in delivering the opinion of the Supreme Court, declared that the plaintiffs had waived their rights under the first charter-parties by substituting others through their own free will. This conclusion necessarily followed, when it was considered that the plaintiffs could have enforced at law their original contract, and recovered damages in every way commensurate with the loss that they would have sustained. The learned Justice might also have quoted Baron Parke's words in *Parker v. Bristol and Exeter Railway Co.*, 6 Exch. 702, to the effect that duress of goods cannot avoid a contract.

Sometimes the remedy is one which is peculiarly appropriate. Where the straight course of resistance is also manifestly the more convenient one, the ends of justice require that the plaintiff should not yield to the demand, but proceed to redress in the path that the law has marked out for him. The law in such cases does not merely suggest the more direct means of relief, it confines the plaintiff to the appropriate remedy which lies open to him. It is mandatory, not directory. This *appropriate remedy* may be either at common law or by statute.

The extraordinary latitude allowed the plaintiff in the action of *assumpsit* for money had and received sometimes makes a resort to it of doubtful fairness. The nature of the count is so well understood that we need hardly do more than to refer in passing to a few leading cases.

In a note to *Dutch v. Warren*, 1 Strange, 407, the reasons for prohibiting its use under certain circumstances are well set

forth. It should not be employed where it would throw the burden of special pleading on the defendant: *Sir Richard Newdigate v. Davy*, 1 Lord Raym., 742; *Lindon v. Hooper*, Cowp. 414; *Feltham v. Terry*, Pasch. 13, George III. B. R.; or where its application would entrench upon established forms: *Power v. Wells*, Cowp. 818; or where its introduction would be manifestly inconvenient on the grounds of public policy. The familiar case of *Lindon v. Hooper*, Cowp. 414, presented the following question: Can "the proprietor of cattle distrained, doing damage, who has paid money to have his cattle delivered to him, bring an action for that money as had and received to his use?" Lord Mansfield decided that the action was not maintainable on the ground that the plaintiff should have replevied or brought trespass at the time of the distraint. In *Knibbs v. Hall*, 1 Esp. 84, the defendant sought to set off against a claim for use and occupation of certain rooms in the City Chambers an overplus of rental which he had previously paid to the plaintiff in order to avoid a threatened distress. "Lord Kenyon was of the opinion," says the reporter, "that this could not be deemed a payment by compulsion, as the defendant might by replevin have defended himself against the distress; that therefore after a voluntary payment so made he should not be allowed to dispute its legality, and therefore the evidence was rejected." These decisions are in every sense leading ones, and the principles involved in them have been followed in a variety of cases. See *Colwell v. Peden*, 3 Watts, 327.

We have suggested that the appropriate remedy may be one that is specially pointed out by statute. Thus in *Phillips v. Jefferson County*, 5 Kansas, 412, one of the reasons for deciding against the plaintiff was that the legislature had expressly given a remedy of which he should have availed himself. The money sought to be recovered had been paid under protest to the county treasurer in order to redeem of the plaintiff's certain lands which had been already sold to cover the amount of illegal taxes. Tax sale certificates had already been assigned, and the plaintiff alleged that he had paid the amount of the taxes to prevent deeds from

issuing upon the certificates. The court, however, regarded his payment as a voluntary one. The laws of his State would have pointed out a specific means of asserting his title to the lands. The money which he had paid had been handed over to the holders of the certificates, and his recovery would have given rise to complications between the county and those holders. See also *Wabaunsee v. Walker*, 8 Kansas, 431; *Hazlerigg v. Donaldson*, 2 Metc. (Ky.) 445; *Chitty on Contracts*, § 913, and cases cited.

The remedy open to the payer must have been at common law, and the fact that he might have gone into equity is not regarded as placing him in the position of one who has had his day in court. Outside of a few Pennsylvania cases—*McCrickart v. City of Pittsburgh*, 88 Pa. St. 134; *Union Insurance Co. v. Allegheny*, 101 Pa. St. 250; and *Shaw v. City of Allegheny*, 115 Pa. St. 46—we have seen only one decision that is at all at variance with this statement of the law. This was that of the *Mariposa Co. v. Bowman*, Deady, 228, a case decided by a Circuit Court of the United States in the State of California. It is only necessary to run down the list of the cases already cited in order to be convinced of the correctness of the assertion we have made. Many, perhaps the majority, of the cases where a recovery has been allowed were instances of illegal taxes and assessments paid in order to prevent a seizure and sale of personal property, cases in which a direct resort to equity for relief unquestionably lay open to the plaintiffs.

In the *Union Ins. Co. v. City of Allegheny*, a Pennsylvania case, which we have already cited, an illegal claim for taxes had been paid in order to avert a sale of real estate. The lien of the taxes, it will be remembered, had been divested by a prior judicial sale. The tax sale would have been wholly unauthorized and void, and no title to the property would have passed by it. The late Chief Justice Mercur, however, was not content to base his decision on this ground alone. He adds: "It is said the plaintiff had not its day in court. True, it had not. The taxes were not laid against it or its property. The company did not propose to attack the validity of the assessment. In several of the cases



cited the party had had no day in court, no hearing or opportunity of being heard; yet he might have had it before making payment by appropriate action. Failing to avail himself of it, he waived his rights. So here, by application to the equitable powers of the court or by bill in equity, execution might have been stayed and the claim removed from the record. No immediate or urgent necessity existed for the payment of the taxes to protect the property of the plaintiffs." The facts in this case were, as we have already remarked, substantially those of the later one of *Shaw v. Allegheny*, 115 Pa. St. 46, with the one exception that in the latter case the plaintiff had invoked the equitable powers of the court for relief, and that an injunction restraining the city authorities from selling his property had been refused him, a distinction between the two cases on which Mr. Justice Sterrett, who delivered the opinion of the court, seems to have laid especial stress. Adopting in part the language of the late Chief Justice which we have just quoted, he bases his decision in favor of the plaintiff's right to a recovery in the action before him almost, if not entirely, on the failure of his application to the equity side of the court.

It would, indeed, seem a harsh and unreasonable rule that the payer of taxes illegally demanded and paid in order to prevent the sale of his property should, in order to sustain his right to a recovery, be forced to show not only that he had no proceeding at law open to him to avert the wrong, but also that his case was one in which he could not have invoked the assistance of a chancellor. Such a construction of the "day in court" as has been pointed out by counsel in a recent case before the Supreme Court of Pennsylvania, *De La Questa vs. Insurance Co.*, 136 Pa. St. 62,—would read like the very converse of the maxim that limits a resort to equity, and a suitor may, perchance, hereafter be ruled out of a court of law upon the ground that he had a full, adequate and complete remedy in equity.

II. *The payee may have an opportunity to appear in court and make defense, and so prevent the infliction of the threatened wrong.*

The compulsion here is that of legal process, the day in

court being had in the very proceedings through which the injury would have been inflicted. Again, we need hardly do more than mention in passing a few leading cases. The facts in *Brown v. McKinnally*, 1 Esp. 279, were as follows: The defendant had agreed to sell the plaintiff iron of a certain quality for a certain price. Iron of an inferior quality was delivered, and upon the plaintiff's refusing to pay the purchase money agreed upon, the defendant brought suit against him. While the suit was still pending he paid the full amount demanded, declaring, however, at the time, that he did so without prejudice to his rights, and that he intended to recover back by a subsequent action, the overplus so paid. Lord Kenyon naturally would not admit the right to bring this subsequent action. The plaintiff's ground for his suit to recover should have been used as the basis of his defence to the claim. In short, allow in such cases the subsequent right of action, and you in effect try such questions twice. See *Hamlet v. Richardson*, 9 Bingh. 644; *Wilson v. Ray*, 10 Ad. & Ellis, 82. (In this last case, certain bills were paid before the action was brought upon them.) See also *Atlee v. Blackhouse*, 3 M. & W. 633; *Carter v. Carter*, 5 Bingh. 406.

*Marriott v. Hampton*, 2 Esp. 546, is the other leading case on this subject. In it Lord Kenyon pointed out that Lord Mansfield's ruling in *Moses v. McFerlan*, 2 Burr, 1005, only suggested a proper limitation of this principle, instead of conflicting, as had been supposed, with the principle itself. It established that the plaintiff must have had a full opportunity to lay before the court all matters properly belonging to his defence if the consequent judgment is afterwards to be regarded as final and conclusive. See comment upon this case in note to *Dutch v. Warren*, 1 Str. 407.

The effect of such a day in court in precluding a payment from being afterwards regarded as compulsory, has been frequently recognized in this country: *Rawson v. Porter*, 9 Me. 119; *Finnel v. Brew*, 31 P. F. Sm. 362; *Fed. Ins. Co. v. Robinson*, 1 Norris, 357; *Taylor v. Board of Health*, 31 Pa. St. 73;

*Benson v. Monroe*, 7 Cush. 125; *Mays v. Cincinnati*, 1 Ohio St. 274; *Mayor of Balt. v. Lefferman*, 4 Gill (Md.) 425; *Marietta v. Slocomb*, 6 Ohio St. 471; *Robinson v. City Councils*, 2 Richardson, 317; *Emmons v. Scudder*, 115 Mass. 367.

A familiar illustration would be that of a payment of taxes illegally demanded and paid either before or after the institution of legal proceedings in debt or by *scire facias* for their collection. Thus a recovery was refused in case of *Peebles v. Pittsburgh*, 101 Pa. St. 309. The Supreme Court of the State had already said in *Taylor v. Board of Health*, "The threat that is supposed to underlie such demands is a harmless one; that in case of refusal, the appropriate remedies will be resorted to." A payment of taxes illegally demanded by an officer who has power and authority vested in him summarily to sell the payer's property in order to satisfy his demand is, as we have seen, considered involuntary. The converse is equally true: *Forrest v. Mayor, etc.*, 13 Abb. Pr. Repts. (N. Y.) 350; *Mays v. Cinn.*, 1 Ohio St. 274. Judge Dewey in the *Boston and Sandwich Glass Company v. City of Boston*, 4 Metc. 181, declared that where the officer can enforce his demands only by a suit of law, the party desiring to resist the claim must do so at the threshold. "The parties," he went on to say, "treat with each other on equal terms, and if litigation is intended by the party of whom the money is demanded, it should precede payment."

It follows from what we have said that the threat to enforce a contract by appropriate legal proceedings can seldom render a payment compulsory. Thus, in *Forbes v. Appleton*, 5 Cush. 115, a payment by the obligor upon a bottomry bond, in order to prevent the obligee from enforcing it and so taking possession of the payer's vessel, was considered voluntary. The obligee could only have obtained possession of the ship by a suit upon the bond itself. See also *Flower v. Lance*, 59 N. Y. 603.

IV. THE CASES WHERE NOTICE IS NECESSARY. THE FORMS AND GRADES OF DURESS. THE PAYEE, AN AGENT.

We have been discussing one general condition essential to the plaintiff's right to a recovery. In some few cases some-

thing more is demanded by the court. The payer must sometimes show that at the time of the payment, he gave the payee notice of the illegality of his exaction. This notice usually takes its form in the protest.

Where the duress springs from the commission of a manifest wrong, the courts will not stop to consider whether the person exercising the duress was aware of the illegality of his proceeding. See, for instance, *Astley v. Reynolds*, 2 Strange, 915; *Snowden v. Davis*, 1 Taunt. 359; *Irving v. Wilson*, 4 Term 485. All duress, however, is not equally mischievous and reprehensible. It would therefore appear that there are cases on the border line between voluntary and involuntary payments where from the equivocal character of the duress as well as from other circumstances attending the payment, the plaintiff should in good faith have brought to the defendant's notice the wrongfulness of the exaction. See opinion of Paxson, C. J., in *De La Questa v. Ins. Co.*, 136 Pa. St. 75. A purely voluntary payment may readily be recognized. Where, too, the duress is clear and unmistakeable, the dissent of the payer is self-evident. His act is open to but one interpretation. It in no sense implies an admission of the justice or legality of the demand. But on the other hand, where the duress is less pronounced, and its character more equivocal, such an admission will in some cases be inferred unless the plaintiff expressly declare his dissent to the transaction. Here it is only by a positive expression of his dissent that he can reserve his future right to a recovery. It is his duty to speak. Having the power and opportunity to do so, his silence carries with it the implication of consent. *Valpy v. Manly*, 1 M. G. & S. 594 (Chief Justice Tindal); *Grt. West. Ry. Co. v. Sutton*, L. R. 4 H. L. C. 249; *Hearsey v. Pryn*, 7 Johns. 179; *Elliott v. Swartwout*, 10 Peters 137; *Allentown v. Saegar*, 20 Pa. St. 421; *Meek v. McClure*, 49 Cal. 623.

This analysis of the duty of giving notice in certain cases has been suggested by a note in *Kaufmann's Mackeldey*, § 163. In referring to the maxim *qui tacet consentit*, Kaufmann points out that common sense would dictate that it should be understood with the limitation that would be given to it by the interpolation after the word "*tacet*" of the words

"*ubi voluntatem exprimere potuit et debuit*," a limitation that implies the duty of expressing one's dissent to a transaction whenever his silence would admit of no other explanation than that he freely consented.

Is it possible by classifying the different forms and grades of duress, to separate those cases of payments where protest is essential from those where it is not? This, it would seem, can be done only in a very imperfect way, the cases that bear directly upon the subject being exceedingly few in number. It might on first thought appear that a distinction might be drawn as to the necessity for a protest between payments made under what is, strictly speaking, known as duress of property, and payments made under that duress which arises upon the withholding of a legal duty, but such a distinction would not be in harmony with the decisions either in this country or in England.

It is, however, quite clear that where the compulsion is in itself illegal, where for instance one's property is seized or detained without any color of legality or screen of legal process, there notice to the wrongdoer should be regarded as superfluous. As for instance in the leading case of *Astley v. Reynolds*, 2 Strange, 915, where the only excuse that the payee, a pawnbroker, had for retaining possession of the property was the refusal on the part of the plaintiff to pay a manifestly illegal charge. So, where a raft of lumber was wrongfully detained: *Chase v. Dwinal*, 7 Greenl. 134; or where deeds of special value to the plaintiff were threatened with destruction: *Motz v. Mitchell*, 91 Pa. St. 114. So again where money is obtained by "taking advantage of the distresses of others, in violation of laws made for their protection," notice will not usually be necessary. *Chitty on Contracts*, 939. Thus in the cases already cited of bankrupts and insolvent debtors suing to recover money extorted from them by creditors, who in refusing to perform their legal duties had extraordinary opportunity for oppression and extortion: *Smith v. Bromley*, 2 Doug. 696; *Smith v. Cuffe*, 6 M. & Selw. 160; *Lowry v. Bourdieu*, 2 Doug. 472. So it would seem that the payment of illegal fees exacted *colore officii* need not be accompanied by a protest: *Morgan v. Palmer*, 2 Barn & Cr. 729; *Clinton v.*

*Strong*, 9 Johns. 370; *American Steamship Co. v. Young*, 8 Norris, 201.

Judge Dewey, to judge from the opinion which he delivered in the Glass Company's case, 4 Metc. 181, already cited, held that the payment of taxes to a collector armed with a warrant to sell need not be accompanied by a protest. But see C. J. Shaw's words, 12 Pick. 14.

In Pennsylvania the decisions on this point are not conclusive. In *McCrickart v. City of Pittsburg*, 88 Pa. St. 134, the court said, "Had the plaintiff and those whom he represents paid their taxes under protest, or with notice to reclaim them, they might have had some legal ground to stand upon." See also *Hospital v. Philadelphia County*, 12 Harris 229, and opinion of Paxson, C. J., in *De La Questa v. Ins. Co.*, 136 Pa. St. 175.

In California a protest must accompany such a payment of illegal taxes, unless the collector already is cognizant of their illegality: *McMillan v. Richards*, 9 Cal. 365; *Meek v. McClure*, 49 Cal. 623; *Faulker v. Hunt*, 16 Cal. 169.

Where a number of claims are satisfied by one act of payment, some of the claims being legal and others illegal, a protest against the exaction of the illegal ones should generally be made. Here is clearly a case where the implication of assent needs such rebuttal. See *Traherne et al. v. Gardner et al.* 5 Ell. and Bl. 913; *McMillan v. Richards*, 9 Cal. 365.

It would appear from the English decisions that a protest should accompany the payment of an illegal charge made by a shipper to a common carrier in order to induce the latter to perform a carriage. See *Great Western Ry. Co. v. Sutton*, L. R. 4 H. L. C. 249.

It seems that where an illegal license fee has been paid to a municipal corporation, neither payer nor payee being at the time aware of the illegality of such fee, there, inasmuch as the payer has received in the shape of his license a more or less valuable consideration for his money, the fact that he failed to protest may subsequently prevent him from recovering: *Mays v. Cincinnati*, 1 Ohio St. 274; *Allentown v. Saegar*, 20 Pa. St. 421. The corporation under such circumstances is not

obliged by law to refund the amount that it illegally exacted. This would indeed follow from the very nature of the action: for money had and received, which, as well known, lies only for money which the defendant in equity and good conscience cannot retain in his possession. In *Mays v. Cincinnati*, 1 Ohio St. 274, the plaintiff it appeared, had paid excessive license fees for selling poultry, fruit, etc., in one of the markets of Cincinnati. He had paid these license fees without making any protest during the period of three successive years. Judge Ranney, of the Supreme Court of Ohio, before whom the question as to the recovery of the license fees ultimately came, states, among other reasons for deciding against the plaintiff the fact that the money was paid by him without protest or any notice whatever that he intended to recover it back. Another case in point is that of *Allentown v. Saegar*, 20 Pa. St. 421, already cited. There the borough had laid a tax upon moneys at interest, which had been subsequently declared unconstitutional. The plaintiff had paid it together with one which was legally authorized before the tax in question had been declared unconstitutional. Judge Lowrie, when the action for recovery came before him, said: "The payment of the tax was a submission to legitimate authority, which was *prima facie* right in its exercise." \* \* \* "This was an assent to pay more in support of the government of a town than the town had a right to demand, and the law does not imply the duty of refunding. If it had been paid under protest, that is, with notice that he (the plaintiff) would claim it back, this would repel the implication of an assent and give rise to the right of reclamation." See also *Robinson v. City Council*, 4 Rich. 317; *Mowatt v. Wright*, 1 Wendell, 360.

So far our investigation as to the necessity of giving notice has been confined to an examination into the forms and grades of duress. Sometimes, however, there is present another element which suggests a different line of analysis. The payee may have demanded and received the money not in his own right, but as the agent of a third party. It is plain that where money is voluntarily paid under a mutual mistake of fact to an agent, the latter is liable so long as he retains possession of

the money, but that after he pays it over *bona fide* to his principal, the payer's suit for recovery must be brought against the latter. *Cox v. Prentice* (Ld. Ellenborough), 3 M. & Selw. 348; *Buller v. Harrison* (Ld. Mansfield), 2 Cowp. 568; *Stevenson v. Mortimer* (Ld. Mansfield), 2 Cowp. 805; *Greenway v. Hurd*, 4 Term. 554. Where, however, the plaintiff's ground of action is duress, not mistake, the question as to the agent's liability must be answered differently.

Mr. Justice Thompson, in the case of *Elliott v. Swartwout*, 10 Peters, 137, seems to be of the opinion that in the case of a compulsory payment to an agent notice is never necessary. No less an authority than Judge Van Ness held apparently the same view. *Ripley v. Gelston*, 9 Johns. 201. See also Judge Spencer's opinion in *Hearsey v. Pryn*, 7 Johns. 179. It seems to us, however, that such a sweeping rule is not supported by the cases. There are two questions which should invariably be answered before a recovery from the agent is to be allowed. These are:

(1). Did the duress arise through the fault of the agent himself, or was he simply the unconscious channel of the illegal compulsion?

(2). Did the plaintiff pay the money expressly to the agent's use or to the use of no one in particular, or did he pay it expressly to the use of the principal?

1. In the case of *Snowden v. Davis*, 1 Taunt. 359, the defendant, a bailiff, had overstepped the terms of two warrants that had been placed in his hands. Under the first the plaintiff paid a larger sum than was called for in the warrant; under the second he paid a sum which, by the very words of the warrant, should not have been collected from him. Lord Mansfield allowed the plaintiff to recover from the bailiff the amount of money which the latter had wrongfully demanded and received. The fact that no actual notice had been given the defendant before he had paid the money over to his principal, made not a particle of difference. The defendant, Lord Mansfield pointed out, had in the case of each warrant acted under no authority at all. From the very circumstances of the case it was impossible to suppose that the plain-



tiff had paid the money to the use of anybody in particular.

See also *Andrews v. Cawthorne*, Willes, 536; *Oates v. Hudson* (Baron Parke's opinion), 6 Exch. 348; *Parker v. Railway Co.*, 6 Exch. 705, 706, *Ripley v. Gelston*, 9 Johns. 201, it will be remembered, was the case of a payment by some ship-owners to a collector of a port in order to obtain a clearance for their vessel. No protest had been made, and the money had been paid over by the defendant to his principal. Judge Van Ness, however, held the collector liable on the general ground that the payment had been a compulsory one. With all respect to the authority of the learned jurist, we think that he might have based his decision upon a more specific ground. The defendant himself had been clearly at fault. It was of his own motion and upon his own responsibility that he refused to grant the clearance; he was in no sense the unwitting instrument of a compulsion. The money was obtained by his own "illegal act, and he could not discharge himself by paying it over": Lord Ellenborough in *Townson v. Wilson*, 1 Campb. 397. Judge Spencer, in *Hearsey v. Pryn*, 7 Johns. 179, which was an action brought against a toll-collector, lays great stress upon the fact that notice had been given him of the illegality of his demands. This, however, was clearly a case that called for notice on the ground that the defendant could not have been expected otherwise to know the peculiar reasons for the plaintiff's exemption from the toll charge.

The opinion of the Snpreme Court of the United States in *Elliott v. Swartwout*, 10 Peters, 137, was given upon two supposed cases. It was asked:

(1). "Whether the collector is personally liable in an action to recover back an excess of duties paid to him as collector, and by him in the regular or ordinary course of his duty paid into the Treasury of the United States; he, the collector, acting in good faith and under instructions from the Treasury Department, *and no protest being made at the time of payment, or notice not to pay the money over, or intention to sue to recover back the amount given him.*"

(2). "Whether the collector is personally liable in an action

to recover back an excess of duties paid to him as collector, and by him paid over in the regular and ordinary course of his duty into the Treasury of the United States, he, the collector, acting in good faith and under instructions from the Treasury Department, *a notice having been given him at the time of payment that the duties were charged too high, and that the party paying so paid to get possession of his goods, and intended to sue to recover back the amount erroneously paid, and a notice not to pay over the amount into the Treasury.*" Mr. Justice Thompson, in reviewing the law on the subject both in England and America, came to the conclusion that the collector would not be liable in the first case, but that he would be in the second. He says: "From this view of the cases, it may be assumed as the settled doctrine of the law that where money is illegally demanded and received by an agent he cannot exonerate himself from personal responsibility by paying it over to his principal, if he had notice not to pay it over." This decision is now valuable only as an illustration of the doctrine that we are discussing, inasmuch as the whole matter has since been made the subject of statutory regulation.<sup>1</sup>

As we have already suggested in another connection, it has been decided by the Supreme Court of California that where the collection of certain State or city taxes is unauthorized for reasons not necessarily apparent to the collector, as for instance, because of some irregularity in their assessment not appearing

(1.) See Revised Statutes of U. S. §§ 3010-3013. An Act of Congress now requires that the importer shall file a written protest with the Collector. As to internal revenue tax cases, Mr. Chief Justice Waite says: "In *Railroad Co. v. Commissioners*, 98 U. S. 544, that the actions in *Philadelphia v. Collector*, 5 Wall. 370, and *Collector v. Hubbard*, 12 Id. 13, were sustained "upon the ground that the several provisions of the internal revenue Acts referred to warranted the conclusion as a necessary implication that Congress intended to give the tax-payer such a remedy. It is so expressly stated in the last case, p. 14. As the case of *Erskine v. Van Arsdale*, 15 Id. 75, followed these, and was of the same general character, it is to be presumed that it was put upon the same ground. In such cases the protest plays the same part that it does in customs cases and gives notice that the payment is not to be considered as admitting the right to make the demand."

upon the papers handed him to guide him in the collection, there notice to the collector of the reasons for the payer's belief in such illegality must be served upon the collector. *Meek v. McClure*, 49 Cal. 623. The Supreme Court of Michigan has said: "There are such practical hardships in permitting persons to be held liable to an action where no protest is made pointing out the reasons why a collector should withhold action under his warrant, that it is a proper subject for legislative consideration whether some provision should not be made to regulate the matter." *Atwell v. Zeluff*, 26 Mich. 118.

We mentioned another question which should be asked where the payment was to an agent. It was, did the plaintiff pay the money expressly to the agent's use or to the use of no one in particular, or did he pay it expressly to the use of the principal? In other words, did the payer so make his payment as to lead the payee into error? The famous case of *Sadler v. Evans*, 4 Burr. 1984, is an instance in point. There the defendant was the receiver of an estate and in that capacity demanded the payment of certain sums. The plaintiff admitted that he had paid the defendant the sums in question expressly to the use of the proprietress of the estate. Lord Mansfield had no difficulty in deciding that the plaintiff should be nonsuited, and that the action, if it lay at all, should have been brought against the proprietress. The understanding of the parties at the time was clearly that the money was collected to be paid over to the principal. A more recent recognition of this doctrine is to be found in the New York case of *Frye v. Lockwood*, 4 Cowan, 456, where a court-martial fine illegally demanded had been paid to the defendant with the express understanding that it should be remitted to his principal.

#### V. THE FORM OF THE PROTEST.

It has been said that a protest in its general sense is "an express declaration by a person doing an act that the act is not to give rise to an implication which it might otherwise cause": *Rapalje & Lawrence's Law Dict.*, "Protest." The author refers to 3 Sav. Syst., 246; *Hilliard v. Eiffe*, L. R. 7 H. L. C. 40. See also *Abbot's Law Dict.*, "Protest," § 1.

Burrill defines the word as "a solemn declaration against an act about to be done, or already done, expressive of disapprobation or dissent; or made with a view of preserving some right which but for such declaration might be taken to be relinquished, or of exonerating the party protesting from some liability which might otherwise attach to him": *Burrill's Law Dict.*, "Protest."

It would appear that the protest which accompanies the making of an involuntary payment is primarily an expedient of the payer's adopted by him in order to escape the legal inferences of his act. It is analogous to the old protestation of the pleader, it is "the exclusion of a conclusion": *Stephen on Pleading*, 218; *Coke upon Lit.*, 124 b.; and yet we shall see that such is true only in a very limited sense of the protest which we are discussing.<sup>1</sup>

We must not confound the notice in certain cases where money has been paid under a mistake of fact with the protest which we have under discussion. The purpose of the notice given in cases of mistake is entirely different, and it is, consequently, governed by different rules. It usually takes the form of a demand for the money, and, as we have already seen, fixes the liability of a payee agent where the money has not already passed out of his hands: *Cox v. Prentice*, 3 M. & Selw. 344; *Buller v. Harrison*, Cowp. 566. Where, however, the sole ground for recovery is the fact of compulsion, the notice given includes an objection, and to be effectual as such it must be made at the time of payment: *Abbot's Law Dict.*, "Protest," § 6.

Thus in *Benson v. Monroe*, 7 Cushing, 125, a Massachusetts case, where illegal head moneys were demanded of the master of a ship and finally paid by him in order to dissolve an

(1.) The protest defined by Merlin (*Répertoire de Jurisprudence*, Protestation) has evidently a much broader application. It may, however, be well to quote his words. He says: "C'est une déclaration qu'on fait par quelque acte contre la fraude, l'oppression ou la violence de quelqu'un ou contre la nullité d'une procédure, d'un jugement ou de tout autre acte, par laquelle déclaration on proteste, que ce qui a été fait ou qui serait fait au contraire, ne pourra nuire ni préjudicier à celui qui proteste, lequel se réserve de se pourvoir en temps et lieu contre ce qui fait l'objet de sa protestation."

attachment of his vessel, his attempt after payment to induce the defendant to sign a paper acknowledging the payment to have been made under protest was regarded as a circumstance militating against the right of recovery.

Moreover, the protest with which we are concerned is more than a naked objection. The payer may object to satisfying a demand for other reasons than its illegality. He may deem the claim a harsh and unreasonable one, and urge upon the payee that he has no moral right to enforce it. Such an objection carries with it no intimation that the legality of the claim is disputed, and no warning of subsequent proceedings to test the payee's right to the money which he has exacted. In order, also, that the protest should not be regarded as a mere objection it should be made contemporaneously with the act of payment. In *Greenway v. Hurd*, 4 Term, 553, a collector of the excise was sued for certain duties illegally demanded and paid by the plaintiff under alleged circumstances of duress. It appeared that the plaintiff had objected to the duties when first levied, but after a month's interval he had yielded and paid the full amount of the demand. The officer, having already paid the money over to his superiors, was not held liable. Lord Kenyon took the ground that the defendant was entitled to notice. He speaks of the plaintiff as having led the defendant into an error, and Buller, J., says that the plaintiff "seemed afterwards to waive" the objections he had made. See this case as commented on by Mr. Justice Thompson in *Elliott v. Swartwout*, 10 Peters, 137. In *Rawson v. Porter*, 9 Maine, 119, the defendant was an attorney who had been retained by some creditors of the plaintiff to press some claims of theirs against him. The defendant had caused certain goods of the plaintiff to be attached, but a compromise was effected under which this attachment was set aside, the plaintiff promising to transfer to the defendant certain other items of property. In a dispute which followed as to the costs in the attachment suit the plaintiff "strenuously objected" against paying a certain  $2\frac{1}{2}$  per cent. commission. He, however, finally yielded, and gave the defendant a promissory note

for the amount. The Supreme Court of the State would not allow the plaintiff to recover the sum paid upon this promissory note. It was plain indeed that the plaintiff had had his day in court, because he could have resisted the collection of his note; but, as though to dispel all doubt as to the nature of his payment, the court distinctly adds: "He gave no intimation at the time of any intention to reclaim the money as paid by compulsion or unjustly extorted."

It may be said that the protest that accompanies a compulsory payment is a declaration, oral or written, made by the payer of money illegally exacted, and made at the time of the payment, to the effect that the money so paid is illegally exacted. The payer may couple with his protest a formal statement to the effect that he intends to institute legal proceedings for a recovery of the money he has paid. Though such an express reservation of his right is often added, it appears from the decisions that such a reservation may also be implied from a protest such as we have defined: *Valpy v. Manly*, 1 M. G. & S. 594; *Hearsey v. Pryn*, 7 Johns. 179.

The courts have drawn no distinction between an oral and a written protest, one being regarded quite as efficacious as the other.<sup>1</sup>

Abbot, in his *Law Dictionary*, "Protest," § 6, says: "As far as form is concerned, almost any which is distinct and certain, and gives the creditor or claimant means of reducing the demand to limits within which it can be sustained, is sufficient."

Where a protest is due a government collector, it should point out with more or less particularity the illegality complained of. See the protest that was offered in *Marriott v. Brune*, 9 Howard, 622. See also *Atwell v. Zeluff*, 26 Mich. 118.

A California case has shown the necessity in some cases of carefully considering the nature of one's protest: *Meek v. McClure*, 49 Cal. 623. An action had been brought against a tax collector to recover part of a municipal assessment paid

(1.) The protest required by law to be made in the case of a payment of an illegal duty to a United States Customs Collector must be in writing. See U. S. Rev. St. §§ 3010-3013.

under circumstances of duress. The sum claimed as wrongfully exacted from the plaintiff had been added to the original sum levied by the assessors by a certain Board of Equalization. The latter had power to increase the assessments upon properties, but not to do so without giving a hearing to the owners. On this occasion the board had not heard the objections of the plaintiff, but had summarily increased the value of his property. The amount which he claimed as due him from the collector was the illegal increment thus added to his taxes. The court, however, would not allow him to recover. Notice in the form of a protest had indeed been served upon the officer, the case being one that required notice according to the decisions in California. But the court went further. It declared that, though the plaintiff had stated in his protest the precise amount of the sum illegally exacted, the defendant had not been informed of a fact which the plaintiff was bound to bring to his notice. The plaintiff should have pointed out his reasons for believing the exaction of that amount illegal. The court's words are: "In this case the defendant was not informed by the protest that the plaintiff claimed that the action of the Board of Equalization was void, and there was nothing in the assessment roll or other document which came into the hands of the tax collector which would impart notice to him that the action of the Board of Equalization in increasing the valuation of the plaintiff's property was void because the order was made without any complaint having been filed before the board stating that the valuation was too high. The protest, in our opinion, was not sufficient to entitle the plaintiff to maintain an action to recover back the amount paid on account of the increase of the valuation of the property."

#### VI. LIMITATIONS UPON THE EFFECT OF THE PROTEST.

Does the protest serve any other purpose than that of notice? Does it in any way affect the equities of the parties? Reasoning from the cases the problem presented is at first puzzling. See, for instance, Mr. Justice Thompson's opinion in *Elliott v. Swartwout*, 10 Peters, 137, and Judge Lowrie's in

*Allentown v. Saegar*, 20 Pa. St. 421. See also the opinion of the court in *Meek v. McClure*, 49 Cal. 623.

The fact that the payer protested is often important in establishing the compulsion. Its weight with the jury may be of value. Like any other part of the transaction, the fact of the protest may be offered by the plaintiff as tending to show the involuntary character of his payment. See in particular the opinion of the court in *McMillan v. Richards*, 9 Cal. 365. It is analogous to and represents the physical resistance which accompanies duress of life and limb.

On the other hand, a protest alone and unsupported by other evidence of compulsion is of no value. This is so from the very nature of the protest. It is only a declaration made by the payer at the time of the payment. The *reductio ab absurdum* is obvious. Once admit that the fact of compulsion may be *prima facie* proved by showing that the plaintiff made a protest, and one has the spectacle of a voluntary payment rendered involuntary by an act of the payer himself.<sup>1</sup>

It is surprising, however, how often counsel, in the face of this almost self-evident limitation on the effect of a protest, have contended for a recovery on the ground alone of the existence of the protest. Misapprehension has probably arisen from two causes. First, the count for money had and received allows the offer of mistake and fraud as well as compulsion, and the precise grounds of the decision of the court in a particular case are not always distinctly recognizable. Secondly, actions in form that of assumpsit for money had and received, have been expressly or impliedly given by statute in cases where, strictly speaking, they would not have laid at common law. So, for instance, as Chief Justice Waite has pointed out actions against the officers of the internal

(1.) See for instance *Brown v. McKinally*, 1 Esp. 279; *Fleetwood v. City of New York*, 2 Sandf. 476; *Forbes v. Appleton*, 5 Cush. 118; *Union Ins. Co. v. City of Allegheny*, 101 Pa. 250; *Peebles v. Pittsburgh*, 101 Pa. St. 304; *Brumagin v. Tillinghast*, 18 Cal. 265; *Smith v. Shroeder*, 15 Minn. 35. The last two cases show the necessity of bringing the action for recovery against the person who is responsible for the duress.



revenue have been allowed under special statutory regulations, and in such cases the protest rightly plays a much more important part as one of the conditions of a recovery. *Railroad Co. v. Commissioners*, 98 U. S. 541.

We shall content ourselves in this connection with quoting a few dicta. "Protest has nothing whatever to do with voluntary payments." "It is available only in cases of duress or coercion, or when undue advantage is taken of the party's situation:" *McMillan v. Richards*, 9 Cal. 365. Among other cases the court cites *Chase v. Dwinall*, 7 Greenl. 134; *Clinton v. Strong*, 9 Johns. 370; *Forrest v. Mayor, etc.*, 13 Abb. Pr. Repts. 350. "A party who has paid voluntarily under a claim of right shall not afterwards recover back the money, although he protested at the time against his liability": Chief Justice Shaw in *Freston v. Boston*, 12 Pick. 13. See also *Lee v. Inhabitants*, 13 Gray 476. "People might regularly pay under protest and await the chances of illegality": *Detroit v. Martin*, 22 Am. Rep. 512. "Where there is no legal compulsion, a party yielding to the assertion of an unjust claim, cannot detract from the force of his concession by saying, 'I object,' or 'I protest,' at the same time that he actually pays the claim. The payment nullifies the protest as effectually as it obviates the previous denial and contestation of the claim": *Forrest v. Mayor, etc.*, 13 Abb. Pr. Repts. (N. Y.) 350. See also *Cook v. Boston*, 9 Allen 893; *Flower v. Lance*, 59 N. Y. 603; *Emmons v. Scudder*, 115 Mass. 369; *Phillips v. Jefferson Co.*, 5 Kan. 412; 4 Wait's Act. & Def. 493, and cases cited. In *Railroad Co. v. Commissioners*, 98 U. S. 542, the late Chief Justice Waite quoted with approbation the following words of the court in *Wabaunsee County v. Walker*, 8 Kans. 431: "Where a party pays an illegal demand with a full knowledge of all the facts which render such a demand illegal, without an immediate or urgent necessity therefor, or unless to release his person or property from detention, or to prevent an immediate seizure of his person or property, such payment must be deemed voluntary and cannot be recovered back. And the fact that the party at the making of the payment files a written protest does not make the payment involuntary." "This," the Chief

Justice continues, "is as we understand it, a correct statement of the rule of the common law. There are, no doubt, cases to be found in which the language of the court, if separated from the facts of the particular case under consideration, would seem to imply that a protest alone was sufficient to show that the payment was not voluntary; but on examination it will be found that the protest was used to give effect to the other attending circumstances."

A very practical distinction has been observed by the courts of California, Michigan, Massachusetts, and possibly some other States, as to the allowance of interest in cases where it was clearly the duty of the plaintiff to protest: *Meek v. McClure*, 49 Cal. 623; *Atwell v. Zeluff*, 26 Mich. 120; *McKee v. Campbell*, 27 Mich. 497; *Detroit v. Martin*, 22 Am. Rep. 512. See also *Vermont Central R. R. Co. v. Burlington*, 28 Vt. 193, and *Henry v. Chester*, 15 Vt. 470. Under such circumstances interest upon the money will be allowed only from the time that notice of the illegality of the demand was served upon the defendant. Where no notice is given before the institution of the proceedings to recover, interest runs only from the date of the service of the writ. In *Atwell v. Zeluff*, 26 Mich. 120, the court, referring to two Massachusetts cases, *Amesbury Manufacturing Co. v. Inhabitants*, 17 Mass. 461; and *Glass Co. v. Boston*, 4 Metc. 181, said: "Where the money is not paid under protest, it is there (i. e. in Massachusetts) held that no interest should be allowed until the demand is made or the action is brought, so as to put the party sued in actual fault for not making satisfaction as soon as the wrong is pressed upon his notice. A payment without protest may prevent him from making inquiry and examining into the law, and while ignorance will not excuse an illegal demand, it may very properly qualify the extent of damages for a merely technical wrong." It is to be regretted that rulings upon this subject have not been more common.

In *McMillan v. Richards*, 9 Cal. 365, it was decided that "a redemption of property sold under a decree of foreclosure was accomplished by a payment under protest of the amount claimed to be due by the sheriff though certain portions claimed were disputed." The court said the

protest "does not create a lien upon the money paid, or any legal impediment to its control. It does not impair, in any respect, the operative effect of the payment as a discharge of the demand upon which it is made, so far as such demand is legal."

## VII. SUMMARY.

Money paid under protest and subsequently recovered must then have been paid also under circumstances of compulsion, unless the case is specially excepted by statute from the rules governing the action for money had and received.

As regards involuntary payments the old duress of Blackstone and the other commentators has long been expanded so as to embrace a threatened injury to property as well as person. Money paid in order to avert a threatened seizure or detention of personal property—sometimes, though rarely, a sale of real property—or paid under certain conditions in order to induce another to perform a legal duty wrongfully withheld by him, may now be recovered in an action of assumpsit. It is only in such cases of involuntary payments that the protest plays its part. It is only in such cases, based on refinements of the old *durities*, that the protest becomes the subject of consideration.

To establish a payment under duress, the plaintiff must show that he was without "his day in court." If he had it either as plaintiff in a proceeding by which adequate redress against the threatened injury might have been obtained by him, or if the wrong could have been inflicted only by legal process against which he might have made defence, he cannot afterwards maintain his action for recovery.

In a few cases a compulsory payment may be proved, and yet the courts may refuse to allow the plaintiff to recover. The plaintiff must sometimes, though rarely, it is true, show that he objected against the illegality of the exaction in such a way as to give an unmistakable coloring to his act of payment and an express or implied warning to the payee of the legal proceedings he intended to institute. In other words, in some few cases the payer must protest. These cases are not well defined. The courts have not laid down the law concerning them in clear and precise terms. Perhaps it was